SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1202

SPEYER, INC. and YELLOW CAB COMPANY OF ERIE, Petitioners

v.

HUMBLE OIL & REFINING COMPANY and A. O. SMITH CORPORATION, Respondents

BRIEF AND APPENDIX OF RESPONDENT HUMBLE OIL & REFINING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

PAGE

Opinions Below 1

Questions Presented 2

Counter-Statement of the Case 3

Argument

I. The Decision of the Court of Appeals Affirming, on the Particular Facts, the Judgment of the District Court in a Non-Jury Trial Involving Application of the Law of Pennsylvania Relating to Negligence and Strict Liability, is Completely Valid and Proper and Does Not Merit Review by This Court. 10

II. Petitioners Should Not Be Permitted to Raise for the First Time on Petition for Certiorari an Objection to Trial Procedure Not Raised at Trial or in the Court of Appeals. 13

III. Pretrial and Trial Procedure Adopted by District Court Was Within That Court's Discretion, Which Discretion Was Properly Exercised. 15

Conclusion 19

Appendix 20

TABLE OF CITATIONS

CASES

Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198 (1956) 12

California v. Taylor, 353 U.S. 553 (1957) 13

Citron v. Aro Corporation, 377 F.2d 750 (3rd Cir. 1967), *cert. denied,* 389 U.S. 973 (1967) 18

Duignan v. United States, 274 U.S. 195 (1927) ... 13

Eisman v. Samuel Goldwyn, 30 F .Supp. 436 (S.D. N.Y. 1939) 15

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 10, 12

Table of Citations.

CASES	PAGE
General Box Co. v. United States, 351 U.S. 159 (1956)	12
Huddleston v. Dwyer, 322 U.S. 232 (1944)	12
Husty v. United States, 282 U.S. 694 (1931)	13, 14
Lawn v. United States, 355 U.S. 339 (1958), *rehearing denied,* 355 U.S. 967 (1958)	13
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)	12

STATUTES AND RULES

28 U.S.C. § 1652	10
Rule 5 II B, U. S. District Ct., W.D. Pa.	15
Rule 5 II C, U. S. District Ct., W. D. Pa.	15

MISCELLANEOUS

1A Barron and Holtzoff, *Federal Practice and Procedure,* § 471 (1960 Ed.)	15

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OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania (hereinafter called the "District Court") is reported at 275 F. Supp 861 (1967), and, contrary to the statement made in the Petition for Certiorari, the Opinion of the United States Court of Appeals for the Third Circuit (hereinafter called the "Court of Appeals") is reported at 403 F.2d 766 (1968).

QUESTIONS PRESENTED

1. Is certiorari warranted to determine whether a question of Pennsylvania law was properly decided in a non-jury trial where the District Court found the evidence established that an accident occurred solely as a result of plaintiffs' negligence and that the facts exonerated defendants from any legal fault whatever, which finding was sustained unanimously by the Court of Appeals, and where both the District Court and Court of Appeals fully considered, in rendering their respective decisions, the applicable law of Pennsylvania?

2. Should plaintiffs be permitted to raise for the first time on a petition for certiorari an objection to the trial procedure in a non-jury trial where such objection was not raised during trial, or before the District Court in either pretrial or post-trial arguments or briefs, and was not raised, briefed or argued before the Court of Appeals?

3. Is certiorari warranted to review the procedure utilized by the District Court, without objection from plaintiffs, in a non-jury, non-personal injury action where plaintiffs had full and ample opportunity to present their position and evidence?

COUNTER-STATEMENT OF THE CASE

It would require an unduly long counter-statement to correct all of the misstatements of fact and erroneous impressions of the facts which are created by plaintiffs' Petition. Fortunately we need not follow this approach since the material facts are clearly and accurately set forth in the opinions of the Courts below.[1]

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1. Both the District Court and the Court of Appeals are in agreement as to the facts (District Court Opinion, P. 22; Court of Appeals Opinion, P. 42).

The fifth paragraph of the Jurisdictional Findings and Conclusions of the District Court, as quoted in plaintiffs' Petition, was amended by Order of the District Judge to correct a minor transcribing error. The Order Amending Finding reads in full as follows:

> "AND NOW, *October 19, 1967,* in my opinion and order entered October 18, 1967, in Jurisdictional Findings and Conclusions, 5th paragraph, the second line reads—'only against Humble and Speyer.' The word 'Speyer' is in error. The phrase should read—'only against Humble and Smith.' This correction is DIRECTED."

The last portion of footnote 9 in the Opinion of the Court of Appeals, as that footnote is quoted in plaintiffs' Petition, was amended by Order of the Court of Appeals. Following the citation to the Uniform Comercial Code in the third sentence, second paragraph of footnote 9, the footnote now reads as follows:

> ". . . it was held that the right to recover in contract extended only to the immediate buyer of the product or those persons specifically described in the Code, and that, unless privity of contract (either factually or codewise) be established, no right of recovery exists. See Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963). This distinction between the liability of remote manufacturers based on whether the suit was brought in contract or tort was recently abandoned in Kassab v. Central Soya, ... Pa. ....., 246 A.2d 848 (1968). Specifically overruling the *Miller* case, the court held that: '* * * Pennsylvania should join the fast growing list of jurisdictions that have eliminated the privity requirement in assumpsit suits by purchasers against remote manufacturers for breach of implied warrranty.' "

The Opinion as reported in 403 F.2d 766 (1968) contains the corrected version of the footnote.

The following is quoted from the Opinion of the Court of Appeals (403 F.2d 766 at pp. 767-768):[2]

"A gasoline fire destroyed plaintiff Speyer's garage and sixty-five taxicabs owned by plaintiff Yellow Cab Company of Erie, a tenant of Speyer [R. 288a-290a]. A diversity suit to recover the fire damage was instituted in the District Court against Humble Oil and Refining Company, a gasoline supplier, and A. O. Smith Corporation, successor-in-interest to the manufacturer of a certain gasoline pump.[3] A twelve-day non-jury trial followed, and the court, after receiving 2,000 pages of transcribed testimony, rendered judgment in favor of both defendants.[4] Both plaintiffs have appealed from the trial judge's findings and conclusions.[5]

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2. All footnotes are by defendant Humble, except where indicated. All record references in brackets are by defendant Humble. References to the Petition for Certiorari or to its Appendices are by page number following a "P.". References to this Brief and its Appendix are by page number following the abbreviation "Br.". References to the Appendices filed in the Court of Appeals are by page number following an "R.". Page numbers using the letter "a" are from Appendix of Appellants filed in the Court of Appeals (Petitioners here); and page numbers using the letter "b" are from Appendix of Appellees filed in the Court of Appeals (Respondents here).

3. In part, plaintiffs filed this suit on behalf of certain insurance companies. See H. Exs. 141-143. 155-158 (R. 733b-737b, 741b-747b).

4. [Footnote by the Court.] Speyer, Inc. v. Humble Oil & Refining Co., 275 F. Supp. 861 (W. D. Pa. 1967).

5. The trial judge found, *inter alia*, that the defendants were not negligent in any respect; that the defendants were not liable to the plaintiffs under any theory of strict liability; that the sole cause of the fire was the negligence of both of the plaintiffs; that plaintiffs were a single business enterprise; and that an exculpatory clause in a lease between plaintiffs and defendant Humble was enforceable under Pennsylvania

"In April, 1954 an Erie Meter Systems Model #910 gasoline pump was installed in the garage by Cemico, then the gasoline supplier of Yellow Cab [R. 306a-307a, 409a, 422a]. The pump was purchased from Erie Meter Systems by Cemico.[6] In October, 1955 Yellow Cab changed its supplier from Cemico to Humble [R. 267a-269a; H. Ex 122], and purchased Cemico's pump [R. 312a, 412a-413a; 701b; Pl. Ex. 25]. As an accommodation to its new customer, Humble purchased the pump from Yellow Cab and leased it back on a free basis [R. 310a-312a, 1154a-1156a; H.Ex. 115]. Yellow Cab employed no regular gasoline pump attendants; each driver filled his cab's tank at the completion of his shift [R. 116a, 140a-142a, 173a, 189a, 200a, 207a, 211a, 28b, 560b-561b, 563b, 682b-683b].[7]

"As required by the equipment lease, Humble serviced and repaired the equipment from time to time, either through its own employees or through the services of independent contractors[8] [R. 343a-345a, 847a-859a].

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law and would exonerate Humble from liability in any event (P. 22-41).

6. As stated in the Opinion of the District Court (P. 23):

"The Erie pump was selected by J. T. Harper, the President of Yellow Cab, and Humble had nothing whatever to do with its selection, purchase or installation." (R. 207a, 312a, 406a, 422a.)

7. Plaintiffs' statement in their Petition (P. 4) that "gasoline was dispensed by defendant Humble to the taxicabs" is completely false.

8. Plaintiffs' unqualified statement on page 4 of their Petition that Humble assumed a duty to maintain and repair the dispensing unit is untrue. Further, the implications in plaintiffs' Petition (P. 2) that Humble had a duty to maintain the nozzles is completely false. All evidence in the record supports the trial Court's finding (R. 1204a) that "the fur-

In October, 1963 one of these contractors, Jabe,[9] installed a new type, heavy-duty, flexsteel hose[10] on the pump[11] [R. 853a-854a, 713b-719b; H.Ex. 83]. In April, 1964 two mishaps occurred.[12] On April 20, the bumper of a cab hooked the flexsteel hose, and, as the driver drove his vehicle in the garage, the hose stretched extensively, and a quantity of gasoline leaked from the pumping equipment to the floor [R. 273a-277a, 558b]. Yellow Cab then shut down the pump. An investigation by the service contractor disclosed that a metal meter casting had fractured within the pump; the entire meter unit, including the metal cover casting was

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nishing and maintenance of nozzles was the responsibility of Yellow Cab." There was no controversy on this fact, which was admitted by plaintiffs at the trial (R. 317a-319a, 342a, 368a-370a, 1109a-1110a; 703b, 705b; Pl. Exs. 66, 67).

9. In their Petition (P. 4, 5) plaintiffs characterize Jabe as Humble's "agent", despite the finding by the District Court, supported by substantial evidence, that Jabe was an independent contractor (P. 23). The District Court found that Jabe was the best pump service contractor in the Erie area (P. 23; R. 522b-523b).

10. This hose, manufactured by Goodyear (R. 853a-854a; 713b-719b; H. Ex. 83), had Underwriters' Laboratories approval (R. 1068a; 433b-434b) and was used only at problem locations where a heavy duty hose was needed or when requested by a customer (R. 865a-866a, 910a).

11. [Footnote by the Court.] The reason for installing the new type hose was the inability of the regular hose to withstand the unusual wear-and-tear caused by the cab drivers' self-service filling station operation. There was evidence of five instances of damage to the pump hose by cab drivers prior to the switch to the new type [R. 851a-853a].

12. Plaintiffs' statement in their Petition (P. 4) that "At no time prior to April 20, 1964 had any incident occurred with respect to the pump" is misleading since frequent incidents of such damage had occurred. (R. 1177a; See fn. 11, *supra*.) As stated by the District Court (P. 24), "Hose trouble frequently occurred. . . ."

replaced, and the pump returned to service [R. 455a-458a, 462a-469a, 889a, 74b, 317b-319b, 617b-619b].[13]

"Nine days later, on April 29, a similar incident occurred. One of the drivers failed to remove the hose from his cab's tank before driving away from the pump.[14] This caused the hose to jerk and stretch violently [R. 209a-210a, 219a, 222a-223a, 226a, 229a, 553a-554a], bending the metal pipe coupling to which it was attached at the pump [P. 26; R. 715a-716a, 765a, 780a-781a, 348b-349b; Pl.Ex. 13]. Although most of the Yellow Cab employees witnessing this misadventure were aware of the leakage which had followed the accident nine days before, no one inspected the pump [R. 211a-212a, 241a]. Instead, another driver who had observed the violent jerking of the hose proceeded to place the pump in operation to fill his own tank [R. 211a-212a]. Shortly thereafter, gasoline was discovered on the floor near the pump [R. 211a-212a]. This time the spilled gasoline erupted into flames, and the entire building and a large number of cabs were destroyed [R. 213a-215a]."

Trial in the District Court took place in April and May, 1967 before the Honorable Joseph P. Willson, D.J.,

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13. Plaintiffs' statements and inferences in their Petition (P. 5, 10) that no investigation was made after the April 20 incident are contrary to the findings of the District Court (P. 25) and the evidence, and are untrue. As stated by the trial judge in his Opinion, Jabe made "the necessary repairs" and "the usual inspection and operating tests." (P. 25.)

14. As stated by the cab driver and found by the District Court, the driver "hooked" the nozzle of the hose in the filler pipe of the cab. This rendered ineffective certain safety features which might otherwise have prevented the accident. (P. 25-26; R. 174a, 183a, 560b-562b, 680b-681b, 707b; H. Ex. 1.)

without a jury. Extensive pretrial discovery procedures had ensued between the date the action originally was filed in December, 1964 and the time of trial. Following a pretrial conference held on December 29, 1966, an order was entered by Judge Willson, directing plaintiffs to file a pretrial narrative on or before January 20, 1967, "stating precisely the basis of liability of each of the two defendants. . . ."[15] (Br. 21). Further, Judge Willson, having given consideration at the hearing to a motion of defendant Humble to continue the trial until May 29, 1967, included a provision in this same Order that trial would commence April 3, 1967 inasmuch as the trial would be non-jury and plaintiffs' counsel had stated they were prepared to proceed[16] (Br. 21). Plaintiffs entered no objection or protest to this Order of December 29, 1966. However, plaintiffs did not file their pretrial statement until February 6, 1967. Trial commenced April 3 and continued through April 7. On April 6, the trial judge indicated that the Court would recess the trial on April 7 and resume May 10. No objection was made (Br. 22). Prior to the recess on April 7, defendant Humble was directed by the Court, without objection from plaintiffs, to file its pretrial statement by May 1 (Br. 22-23). No previous direction in this regard had ever been entered by the Court or requested by the plaintiffs. Further, at the request of and with the agreement of plaintiffs, and after consultation between Judge Willson and all counsel, defendant

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15. The basis for liability of defendants asserted by plaintiffs was not made known by plaintiffs until the filing of their pretrial statement on February 6, 1967, more than two years after their complaint was filed.

16. At the pretrial hearing held December 29, 1966, counsel for the plaintiffs stated (Br. 20): "I can assure Your Honor before we started the suit, we had the proof."

Humble subsequently agreed to file its pretrial statement on or before April 26 (Br. 23-24). Defendant Humble filed and served its pretrial statement on April 26, 1967, including at the same time as an attachment thereto all reports of Humble's experts on tests and results concluded through April 26.[17] Plaintiffs were not surprised by the theory of the defense, as set forth in the pretrial statement of defendant Humble, since that theory had first been asserted by Humble and made known to plaintiffs in the Answer filed by Humble in February, 1966, more than fourteen months prior to the commencement of the trial and more than one year prior to the filing of plaintiffs' pretrial statement. On May 5, 1967, five days prior to the resumption of trial, a demonstration was conducted by defendant Humble and its experts for the benefit of and in front of plaintiffs' counsel and plaintiffs' experts. This demonstration reenacted the critical tests which defendant Humble subsequently relied on in the presentation of its case on defense.

At the close of the case presented by both defendants, plaintiffs were given the opportunity to put into evidence any rebuttal testimony, and plaintiffs did introduce such rebuttal testimony, including additional testimony from their principal expert witness (R. 1134a-1145a).

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17. Plaintiffs' statement in their Petition (P. 6) that they did not receive the reports of defendant Humble's experts until the morning of resumption of trial on May 11, 1967, is untrue. Plaintiffs received, on April 26, 1967, dedendant Humble's pretrial statement, together with all Humble expert reports then in existence. The only expert report of defendant Humble which plaintiffs did not receive at that time was a report of a test conducted on April 28, 1967 by one of defendant Humble's experts. This report was furnished to plaintiffs on May 5, 1967, the date on which it was rendered to Humble.

ARGUMENT

I. The Decision of the Court of Appeals Affirming, on the Particular Facts, the Judgment of the District Court in a Non-Jury Trial Involving Application of the Law of Pennsylvania Relating to Negligence and Strict Liability, Is Completely Valid and Proper and Does Not Merit Review by This Court.

Petitioners' first two arguments are that the Court of Appeals and the District Court "failed to apply" Pennsylvania law to the facts involved and hence violated the requirements of 28 U.S.C. § 1652 and *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). There is no merit whatever to this contention.

A perusal of the opinions of the Court of Appeals and the District Court in this case abundantly demonstrates that the law of Pennsylvania was fully considered and applied by both Courts to the facts found by the trial judge in this non-jury trial. The issues in this case solely involved questions of Pennsylvania law, and no federal questions whatever were involved. After the conclusion of the trial in the District Court case, lengthy briefs were submitted by all parties to the learned trial judge. The briefs of both plaintiffs and defendants argued Pennsylvania Law, and only Pennsylvania law, as the applicable law to the facts urged by each party upon the Court. The Pennsylvania law cited by plaintiffs in their Petition for Certiorari was fully briefed by both plaintiffs and defendants in their presentations to the trial Court. In addition to written briefs, a lengthy oral argument was held before Judge Willson, during which time many of the facts and legal

points were reviewed. As stated by the learned trial judge in his Opinion (P. 39):

> "Counsel at oral argument and in their briefs have referred to a host of decisions on the law of negligence, especially relating to the concept of foreseeability and want of care. These citations have been examined. . . .The sum total of the evidence in this case not only exonerates Humble and Smith from any legal fault, but on the contrary clearly establishes that the cause of the fire was the careless refueling practices permitted by plaintiffs."

On the appeal to the Court of Appeals, the law of Pennsylvania again was the only law considered by the Court. At the appellate level also, each Pennsylvania case cited by plaintiffs in their Petition was fully briefed by the parties and exposed to the Court of Appeals in oral argument.[18] Thus, both the District Court and the Court of Appeals considered this case on the basis of the law of Pennsylvania and made their respective determinations based on the application of that law, as they determined it to be, to the facts involved. The trial judge and two of the three members of the Court of Appeals panel which heard the case on appeal were and are members of the Bar of Pennsylvania. Judge Aldisert, who wrote the Opinion for the Court of Appeals, had been appointed to that Court less than two months prior to the oral argument, after having served for many years as a trial judge of the Court of Common Pleas of Allegheny County, Pennsylvania.

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18. Of the eight Pennsylvania cases cited by plaintiffs in their Petition as not having been applied by the Courts below, four were actually mentioned in the decision of the Court of Appeals (P. 44, 49).

Clearly, the contention by plaintiffs on this Petition that the lower Courts failed or refused to apply Pennsylvania law is contrary to what actually occurred, and that contention should be rejected. As a reading of the opinions of the District Court and the Court of Appeals demonstrates very conclusively, those Courts not only considered in detail the applicable Pennsylvania law, they accurately interpreted and applied that law to the facts in this case.

In essence, plaintiffs' contention is that the determination of Pennsylvania law by the District Court and by the Court of Appeals with respect to negligence, the duty to warn, and the doctrine of strict liability was erroneous, and that because of such error, the lower Courts failed to observe the dictates of *Erie Railroad Co. v. Tompkins, supra.* If plaintiffs' position were accepted, every diversity case in the federal courts would involve an *Erie* question where, as here, a petitioner challenged the interpretation of state law as determined by the lower court. We submit that such a result is unsound and not dictated by *Erie.* The issues of Pennsylvania law involved in this case are not of such import as to warrant review by this Court. Where, as here, there has been thorough consideration and a determination by the District Court and by the Court of Appeals of a matter of local law, we respectfully submit that this Court should follow its customary and sound rule in such a situation and accept such determinations on the questions of local law. *General Box Co. v. United States,* 351 U.S. 159, 165 (1956); *Bernhardt v. Polygraphic Company of America, Inc.,* 350 U.S. 198 (1956); *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949); *Huddleston v. Dwyer,* 322 U.S. 232 (1944). Accordingly, the writ of certiorari should be denied.

II. Petitioners Should Not Be Permitted to Raise for the First Time on Petition for Certiorari an Objection to Trial Procedure Not Raised at Trial or in the Court of Appeals.

Petitioners' final argument in support of its Petition is that the trial procedure utilized by the District Court in this non-jury trial, wherein defendants were permitted to file pretrial statements after the presentation of plaintiffs' evidence and wherein a recess of four weeks occurred between the presentation of plaintiffs' case and the presentation of the defense by defendants, represented a misapplication of the pretrial procedures of the Federal Rules of Civil Procedure. This contention, which is wholly without merit, was not raised by plaintiffs before the Court of Appeals, and no objection to the procedure adopted by the trial Court was made by plaintiffs at any time during these proceedings at the trial stage. Accordingly, we respectfully submit that plaintiffs should not now be allowed for the first time to raise this matter for review.

This Court has frequently stated that it will not consider questions which were not raised in the appellate court below. *Lawn v. United States,* 355 U.S. 339 (1958), *rehearing denied,* 355 U.S. 967 (1958); *California v. Taylor,* 353 U.S. 553 (1957); *Husty v. United States,* 282 U.S. 694 (1931); *Duignan v. United States,* 274 U.S. 195 (1927). As stated in *Lawn v. United States,* where the Court refused to consider a contention of petitioners that the trial court had erred in ruling on a motion at trial, this Court said (at p. 362):

> "This issue was not raised in the Court of Appeals. Only in exceptional cases will this Court review a question not raised in the Court below."

Similarly, in *Husty v. United States, supra,* the Court said (at pp. 701-702):

> "Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there."

In the case at bar, plaintiffs' claim of error in the trial and pretrial procedure was not raised or argued by them in the Court of Appeals. Further, at the trial and pretrial stages of this case, plaintiffs not only did not object to the procedures of which they now complain, but they acquiesced in and agreed to the procedures used. See Br. 20-24. Accordingly, we submit that the argument of petitioners with respect to pretrial and trial procedures raised here by plaintiffs for the first time should not now be considered.

III. Pretrial and Trial Procedure Adopted by District Court Was Within That Court's Discretion, Which Discretion Was Properly Exercised.

Even if petitioners had raised and argued before the lower Courts the objection which they now make with respect to the pretrial and trial procedure used, such argument would not have had any merit. It is well settled that the formulation of pretrial procedure, especially in a non-jury trial, is within the discretion of the trial court. See, for example, *Eisman v. Samuel Goldwyn,* 30 F. Supp. 436 (S.D.N.Y. 1939). As stated in 1A Barron and Holtzoff, *Federal Practice and Procedure,* §471 (1960 Ed.) at p. 830:

> "[Rule 16 of the Federal Rules of Civil Procedure] places complete discretionary control of pre-trial procedure with the court . . . ."

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the District Court for the Western District of Pennsylvania has formulated Pretrial Procedure Rules, including the following as Rule 5 II B:

> "B. Non-Jury cases shall be pretried in accordance with an Order by the Judge to whom the case has been assigned."[19]

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19. Plaintiffs in their Petition completely misrepresent the application of Rule 5 II C of the Rules of the United States District Court for the Western District of Pennsylvania. Subsection II C of Rule 5, which sets forth the specific pretrial procedure urged here by plaintiffs as being applicable to this case, applies only to "jury cases involving personal injuries." (P. 54.) It is not applicable to jury trials not involving personal injuries or to any non-jury trial. Rule 5 II B is the appropriate rule governing the pretrial procedure in cases other than civil jury cases involving personal injuries and, consequently, is the pertinent rule applicable to this non-jury, non-personal injury case.

In the case at bar, Judge Willson, who heard and decided numerous pretrial motions and arguments, entered appropriate orders, after discussion with counsel, setting forth both the dates on which pretrial statements were to be submitted and the trial schedule. Since plaintiffs not only did not object to these orders, but indicated their willingness to proceed on the basis of these orders, they should not now be permitted to complain.

As noted in the opinions of both the District Court and the Court of Appeals, plaintiffs tried their case on several theories of liability, all of which excluded the theory that the proximate cause of the fire was the careless and negligent refueling practices permitted by plaintiffs (P. 27-28, 45-47). Defendants' theory, on the other hand, was that the negligence of the cab driver in failing to remove the nozzle from the tank of the cab prior to driving away from the pump, and the negligence of plaintiffs in several other related respects, caused the accident (P. 27-31, 45-47). The basic evidence of liability was introduced by expert witnesses (P. 47), and the defendants' theory as supported by defendants' experts was completely rejected by plaintiffs' experts (P. 47-48). However, the District Court accepted the testimony of the defense witnesses and rejected that of the plaintiffs (P. 47), and the Court of Appeals stated that it could not conclude that this determination was erroneous. (P. 47).

Plaintiffs' argument about the trial procedure in essence is an argument that had they known of defendants' theory prior to trial, they would have abandoned their theory and adopted that of defendants. There are certain basic fallacies with this argument. In the first instance, plaintiffs should have been fully aware of

defendants' theory at a very early stage in the case, since the Answer filed by defendant Humble more than fourteen months prior to trial (R. 5a) set forth the theory on which defendants relied throughout this case (R. 45a).[20] Second, plaintiffs, following the trial, argued their case on the basis of both causation theories; i.e., that of plaintiffs and that of defendants. Similar arguments were made by plaintiffs to the Court of Appeals. These arguments were thoroughly considered and then rejected by the Court of Appeals (P. 30-31, 47-48). Accordingly, no prejudice whatever resulted to plaintiffs since they were permitted, and did argue, their positions based on both causation theories after they had at least two months following the trial to research the applicable law. Plaintiffs did not file their brief with the District Court until two and one-half months after the conclusion of the trial (R. 14a), and their brief with the Court of Appeals was not filed until several months after the trial judge's Opinion which was entered on October 19, 1967.

Finally, plaintiffs argue that the delay in hearing the defendants' evidence was prejudicial to plaintiffs since "Judges' memories are no more infallible than

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20. Defendant Humble, in paragraph 3 of the Third Defense of the Answer which it filed, averred as follows (R. 45a):

> "3.) That the fire in question and the alleged malfunction of said pump, if it malfunctioned, occurred by reason of plaintiffs through their employees failing to control the use and operation of the pumps by their employees and specifically further by an employee and driver of Yellow Cab Company driving away from the pump in question with the hose to the automatic nozzle being in the intake pipe of one of plaintiff vehicles or cabs."

jurors' memories." (P. 20.) This argument overlooks a very obvious and significant fact difference. In a jury trial, jurors do not usually have the benefit of a transcript of testimony which they may take into the jury room with them during their deliberations. However, in a non-jury trial, as in this case, the trial judge has before him the complete transcript of all the testimony taken at the trial, and all counsel are permitted to and do argue the facts and law by specific reference to the testimony in the transcript which they contend supports their position.

This difference is extremely significant and clearly demonstrates that a recess in a non-jury trial is not prejudicial. This practice of having recesses during the trial is followed frequently by the courts in non-jury proceedings. The case of *Citron v. Aro Corporation,* 377 F.2d 750 (3rd Cir. 1967), *cert. denied,* 389 U.S. 973 (1967), cited by plaintiffs in their Petition, is completely distinguishable from the case at bar, since that case involved a jury trial with periodic delays between presentation of testimony. In *Citron,* the Court referred to the uncertainty of the memory of jurors who are required to decide a case long after the presentation of plaintiff's evidence. Such is not the situation in the present case, where the transcript of testimony and briefs of the parties were available to the trial judge sitting as a finder of fact. One might also observe that if plaintiffs' position were adopted, a trial judge, in a non-jury case, would be required to render his decision immediately at the close of the trial rather than, as is the normal and accepted practice, several months later following the submission of briefs by all parties.

Thus, even if plaintiffs' assertion of an alleged objection to the pretrial and trial procedure was timely before this Court, such assertion would be completely without merit and would not warrant review by this Court. Accordingly, this Court should not issue the writ requested by plaintiffs.

CONCLUSION

We respectfully submit that there is nothing in the instant case that justifies the granting of a writ of certiorari. The case depends on the application of Pennsylvania law, in a non-jury trial, to a particular set of facts. The District Court and the Court of Appeals thoroughly considered the applicable Pennsylvania law and then rejected plaintiffs' contentions with regard thereto. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpt From Transcript of Pretrial Argument Held December 29, 1966 Before the Honorable Joseph P. Willson, D. J.

[20]

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The Court: . . . Just one more thing before we get into the motions. Do plaintiffs agree you've got to show me the cause of this fire?

[21]

Mr. Gent: Yes.

Mr. Knox: Yes, Your Honor. We didn't know we were under any orders right now to file narrative statements.

The Court: No, no, I'm just rounding this off. You've got to show that.

Mr. Knox: That's right, we have opinions of experts on it, which we will attach to the narrative statement. So when we get to that point, we will get to that.

Mr. Gent: I can assure Your Honor before we started the suit, we had the proof.

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Excerpt From Orders Entered December 29, 1969 on Motions for Production, Discovery and Fixing Time of Trial.

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AND NOW, December 29, 1966, a hearing has been had on the several pending motions and on various other issues relating to the production and exchange of documents and discovery generally. Several oral rulings were made throughout the course of the hearing, particularly with reference to production and exchange of documents which counsel will abide by and which will appear on the transcript of the hearing. However, it is appropriate on several of the rulings made that written orders be entered which follow:

* * * * * * * *

6. Plaintiffs' counsel on or before January 20, 1967 will file a pretrial narrative in accordance with the rules of this Court in non-jury cases stating precisely the basis of the liability of each of the two defendants and the damages claimed.

7. Consideration has been given to the motion of defendant Humble to continue the trial of this case to May 29, 1967. However, as indicated, the trial will be non-jury. Plaintiffs' counsel having indicated that they will be ready, it is ORDERED AND DIRECTED that the trial of this case commence on Monday, April 3, 1967, at 10:30 a.m., and that these Orders as well as the oral rulings as will appear in the transcript apply to both civil actions as appropriate, the understanding being

however that the trial of Civil Action No. 51-65 be postponed until after the trial of Civil Action No. 1177.

JOSEPH P. WILLSON
United States District Judge

cc: All counsel

Excerpt From Transcript of Trial — April 6, 1967.

[754]

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The Court: . . . I mean, I propose this. I just want to throw this out tonight, so you can think about it, and we can agree on a time tomorrow to resume again. But, I had in mind to start on the 10th day of May with the rest of your case, and then with the defense. Is that all right?

Mr. Mellott: Yes, sir, I think that would be all right with the defendant Humble, Your Honor.

Mr. Gent: We understood, Your Honor, that we were to present the liability first.

The Court: I mean to start with your damages on the 10th.

Mr. Gent: Oh, all right.

[755]

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Mr. Knox: I think also, Your Honor, if they [756] are going to start with their liability, we should be furnished with some pretrial statement. We had to give them ours.

The Court: I think so. I think they ought to file that.

Mr. Mellott: All right. Could we have until the end of this month for that, Your Honor?

The Court: Would ten days be enough for the plaintiffs?

Mr. Knox: Sure.

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Letter Dated April 18, 1967 of the Honorable Joseph P. Willson, D. J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Pittsburgh 15219

CHAMBERS OF
JOSEPH P. WILLSON
JUDGE

April 18, 1967

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JOHN M. WOLFORD, ESQ.
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Erie, Pennsylvania 16501

Re: Speyer, Inc. & Yellow Cab Co. of Erie
v. Humble Oil & Refining Company and
A. O. Smith Corporation, et al.
C. A. No. 1177 Erie

Gentlemen:

Mr. Gent by letter of April 14th indicated he was filing a motion relative to the time for filing of the defendant Humble's pretrial statement. By telephone conversation it has been agreed that this will be filed on or before the 26th. Mr. Mellott indicates also that he will comply with the request in the letter relating to the physical test of the equipment. With this understanding of counsel, it will be unnecessary to enter any formal order on the motion. All parties, of course, understand that the trial will resume on Wednesday, May 10th, at 10:00 o'clock A.M.

Regards,

JOSEPH P. WILLSON
Joseph P. Willson